MOTION FILED MAY 22 1959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 357

AMERICAN LIFE AND ACCIDENT INSURANCE COMPANY AND AUTOMOBILE OWNERS SAFETY INSURANCE COMPANY, *Petitioners,*

v.

FEDERAL TRADE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE LATE-FILED PETITION, AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioners American Life and Accident Insurance Company and Automobile Owners Safety Insurance Company move for leave to petition for rehearing, and pray that the Court grant rehearing of its order deny-

ing certiorari, which was entered on October 27, 1958 (358 U. S. 875), and that a writ of certiorari issue to review the judgments of the Court of Appeals for the Eighth Circuit in the above cases as prayed in the petition filed September 11, 1958 herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The ground for this motion and petition is the occurrence of intervening circumstances of substantial or controlling effect, consisting of this Court's order of May 18, 1959, granting certiorari in *Federal Trade Commission* v. *Travelers Health Association*, No. 836, this Term. See *Pickett* v. *Union Terminal Co.*, 315 U. S. 386, 394; *cf. Zap* v. *United States*, 330 U. S. 800. The question presented in the *Travelers Health* case is substantially identical with the first question presented by the petition for certiorari in the present case.

The first question presented by the petition in this case was:

> "whether, under [the McCarran-Ferguson] Act, the Federal Trade Commission has jurisdiction of the advertising practices of an insurance company licensed only in the state of its domicile and conducting business with persons in other states by mail, when the domiciliary state is regulating the advertising practices of such companies under its own laws."

The question presented in the *Travelers Health* case is:

> "Whether the McCarran-Ferguson Act deprives the Federal Trade Commission of jurisdiction to prohibit unfair and deceptive practices by an insurance company doing an interstate business

> solely by mail, where the state in which it is incorporated and maintains its home office prohibits unfair or deceptive practices in the insurance business there or 'in any other State'."

The two questions are thus substantially identical. The facts are also substantially identical. The *Travelers Health* case involves an insurance company domiciled in Nebraska, licensed in only one other state (Virginia), and carrying on an interstate business by mail from its Nebraska office. The present case involves petitioners domiciled in Missouri, licensed in no other state, and doing an interstate business by mail from their Missouri offices. The Nebraska statute, which the Court of Appeals held in *Travelers Health* constitutes regulation by state law within the meaning of the McCarran-Ferguson Act, reads in pertinent part as follows:

> "No person shall engage in this state in unfair methods of competition or in unfair or deceptive acts and practices in the conduct of the business of insurance. No person domiciled in or resident of this state shall engage in unfair methods of competition or in unfair or deceptive acts and practices in the conduct of the business of insurance in any other state, territory, possession, province, country, or district."

The Missouri statute which petitioners contend constitutes regulation by state law within the meaning of the McCarran-Ferguson Act in the present case reads in pertinent part as follows:

> "No life insurance company doing business in this State, and no officer, director, or agent thereof, shall issue or circulate, or cause or permit to be issued or circulated, any estimate, illustration, circular or statement of any sort misrepresenting the

> terms of any policy issued by it or the benefits or advantages promised thereby, or the dividends or shares of surplus to be received thereon, or shall use any name or title of any policy or class of policies misrepresenting the true nature thereof * * *."

The record in the present case contains undisputed evidence that Missouri construes its statute and applies it in practice to regulate the conduct of the business of Missouri insurance companies with policyholders and prospective policyholders in the other states and territories. The Missouri regulatory statute in this case is therefore also substantially the same as the Nebraska statute involved in the *Travelers Health* case.

Petitioners in the present case, like respondent in the *Travelers Health* case, were among the 41 companies whose advertising practices, according to the Government's petition for certiorari in the *Travelers Health* case (No. 836, Pet. p. 11), have been challenged by Commission complaints. If the Court affirms the decision of the Court of Appeals in the *Travelers Health* case, this Court will have held that the Commission lacked jurisdiction to institute any of these 41 cases. See *FTC* v. *National Casualty Co.*, 357 U.S. 560. Unless the judgments below in the present case are set aside, therefore, petitioners may find themselves bound by cease and desist orders, and subject to possible liability for severe penalties for their violation, although the Commission had no jurisdiction to enter the orders by which petitioners are bound.[1] Petitioners will also

[1] Section 5(*l*) of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. § 45(*l*)), provides, for violation of a final Commission order to cease and desist, civil penalties of as much as $5,000 for each violation; and in the case of continuing failure or neglect to obey such an order, each day of continuance of such failure or neglect is a separate offense.

be subject to possible liability for violation of the orders of the Court of Appeals enforcing the Commission's cease and desist orders. No other insurance companies will be in this anomalous position.

CONCLUSION

For the reasons stated, it is respectfully submitted that this motion for leave to file a late-filed petition for rehearing should be granted, and certiorari should be granted.

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing motion for leave to file petition, and petition for rehearing are presented in good faith, and that they are restricted to the grounds specified in Rule 58(2) of the Rules of this Court.

T. S. L. PERLMAN

PROOF OF SERVICE

I, T. S. L. Perlman, one of the attorneys for American Life and Accident Insurance Company, and Automobile Owners Safety Insurance Company, Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22d day of May, 1959, I served the foregoing motion for leave to file petition, and petition for rehearing upon the respondent herein by mailing copies thereof, by first class mail, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington 25, D. C., and to Earl W. Kintner, Esq., James E. Corkey, Esq., and Edwin S. Rockefeller, Esq., General Counsel, Assistant General Counsel and attorney, respectively, of Respondent Federal Trade Commission, at the offices of the Federal Trade Commission, Washington 25, D. C.

T. S. L. PERLMAN